Supreme Court, U.S.
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In The

Supreme Court of the United States

EVA CHARLENE SARDONELL and
DOUGLAS SARDONELL,

Petitioners,

v.

GARY NORIEGA, individually, and as a Council Member, City of Powder Springs; WAYNE WRIGHT, individually, and as City Manager, City of Powder Springs; RICHARD SAILORS, individually, and as mayor, City of Powder Springs; VINCE BLACKMON, individually, and as Code Compliance Officer, City of Powder Springs; and the CITY OF POWDER SPRINGS,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether white citizens who are discriminated against by governmental officials for renting property to black citizens, therefore have a cause of action under 42 U.S.C. § 1982?

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1-4) is unreported. The opinion of the district court (App. 5-38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 18, 2001. A timely petition for rehearing and suggestion for rehearing en banc was denied on February 19, 2002. This Court's jurisdiction rests on 29 U.S.C. § 1254(1) (1999).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1982 provides in full:

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

42 U.S.C. § 1983 provides in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit

in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Introduction

Petitioners are Douglas and Eva Charlene Sardonell ("Douglas" and "Charlene," collectively "the Sardonells"), who are husband and wife. The Sardonells are white citizens of a small town outside of Atlanta called the City of Powder Springs, Georgia (also the "City" or "Powder Springs").

Douglas and Charlene each owns a home in Powder Springs. In Douglas' home, the Sardonells live and during part of the time relevant to this case did work for Douglas' small business, A Cool Flame Heating and Air Conditioning ("A Cool Flame"). The house owned by Charlene, throughout the time relevant to this case, she has rented out to others.

In 1998, Charlene rented her house to black citizens, who thereby became the only African Americans residing on the street. As described within, this led respondent Powder Springs City Councilman Gary Noriega, who lives and whose wife's parents live on this same street, to request an official investigation of the Sardonells and of A Cool Flame. City Councilman Noriega then continued to foment the investigation and, ultimately, the respondent City of Powder Springs issued a citation to Charlene alleging a city ordinance violation. Charlene requested a jury trial, and the matter was bound over to

the State Court of Cobb County, Georgia. With the citation still unresolved, yet new criminal charges were issued, this time alleging that Charlene had parked business vehicles at Douglas' home in violation of two other ordinances. Ultimately, the *independent* Cobb County solicitor's office dropped the charges. The Sardonells brought this federal civil rights action to redress respondents' retaliatory actions against them for Charlene's renting her house to African Americans.

The district court held that the Sardonells, because they are white citizens, have no standing to assert that their civil rights under 42 U.S.C. § 1982 have been violated. The Eleventh Circuit Court of Appeals affirmed. This Court squarely held in *Sullivan v. Little Hunting Park*, 396 U.S. 229 (1969), that a white person who has been discriminated against because he has rented property to a black person has standing to maintain an action under 42 U.S.C. § 1982. Petitioners ask this Court to grant the petition and summarily reverse the Eleventh Circuit's judgment, remanding petitioners' § 1982 claim, and so much of their claim under 42 U.S.C. § 1983 as is based on their § 1982 claim, for further proceedings.

Legal Standard Governing Review of the Record

The decision below of the court of appeals affirmed a grant of summary judgment against petitioners. Therefore, the record, including "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits," Fed. R. Civ. Pro. ("F.R.Civ.P.") 56(c), must be viewed in the light most

favorable to petitioners and all reasonable inferences must be drawn in their favor. *E.g., Celotex Corp. v. Catrett*, 477 U.S. 317 (1986).

The Facts Giving Rise to This Case

Douglas and Charlene each owns a house in the City of Powder Springs, Georgia, as described in the Introduction above.

The house two doors to one side of Charlene's house is owned by Betty Jo Murphy. (Charlene's Deposition ("Depo."), at 43). When Murphy moved into the neighborhood over 28 years ago (Murphy Depo. at 8), none of the houses in the neighborhood was owned by a black person. (*Id.* at 15). Murphy explains, "they've only bought into the neighborhood in the past three or four years" (*Id.*).

Aghast over a plan of Charlene to rent her house two doors from Murphy's to an African American, Murphy remonstrated against this to Charlene on two different occasions during 1998. (Charlene's Depo. at 47-51). On the first occasion, in April 1998 in the nursing home where Murphy's parents were patients and where Charlene worked as a nurse: "Mrs. Murphy asked me if I was going to rent to blacks. She said, you're not going to rent to blacks, are you? I said, I'm going to rent to someone you know, and I told her who I was going to rent the house to," an African-American nurse at the nursing home. (*Id.* at 47). On the second occasion, in August 1998, as Charlene recounts: "she asked me again about renting to blacks and I told her I was going to rent out through

the Section 8 program.[1] She told me there was ways to avoid renting to blacks and she used another [black] gentleman's home [on the next street over] as an example for why I should not rent to blacks." (*Id.* at 48-49). Charlene would not hear of it: "I walked away. . . . I don't care to carry on conversations of that nature with people. . . . I do not want to be a party to that kind of mentality." (*Id.* at 49).

Murphy was undaunted. As Gordon Powell, who lives in the house next to Charlene's, avers in his affidavit, Murphy asked him if he knew about Charlene's intentions with regard to renting her house. (Affidavit of Gordon Powell ("G. Powell Aff.") at ¶ 9 (sworn to Dec. 26, 2000)). Murphy told Powell: She "would just have to see what '*Gary*' can do about this." (*Id.* at ¶ 10 (emphasis added)).

"Gary" is a reference to respondent Gary Noriega ("Noriega"), Murphy's son-in-law, who is married to Murphy's daughter. (Noriega Depo. at 22, 24; Murphy Depo. at 13). As mentioned above, Noriega's house is on the same street as the Sardonells' houses and Murphy's house. (*Id.* at 7).

Gary Noriega is, as mentioned above, a Powder Springs City Councilman. (Noriega Depo. at 8).

As she had planned, Charlene rented her house to the African-American nurse mentioned above, from June until August 1998 (Charlene's Depo. at 36, 47); and again,

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[1] "The Section 8 program" refers to the federal subsidized housing program under § 8 of the United States Housing Act of 1937, 42 U.S.C. § 1437f.

in September 1998, Charlene rented out her house to another person who is African American. (*Id.* at 30-31). One of the Sardonells' neighbors described the neighborhood's demographics at this time: "In 1998, the only African American family on [the street where the two Sardonell houses and Noriega's and Murphy's houses are located] lived in the house owned by Charlene." (Affidavit of John Long ("Long Aff.") ¶ 7 (sworn to Jan. 5, 2001)).

When Charlene rented her house to these black citizens – as averred by three neighbors of the Sardonells and by Douglas as well – the City of Powder Springs instituted an investigation of Charlene and Douglas and Douglas' home-based business, A Cool Flame, for the purported reason of determining if A Cool Flame was operating within the limits of its home-based business license issued by the City of Powder Springs. *See, e.g.*, Douglas' Affidavit at ¶¶ 6-7 ("Prior to my wife renting her home . . . to an African American family, I enjoyed an uneventful existence as a resident and business owner in my neighborhood. . . . Following my wife's rental of her home to an African American family . . . I began to be subjected to investigations by City of Powder Springs officials who alleged that the business activities at my home were in violation of the City's Home Occupation License ordinances."); Long Aff. ¶¶ 2, 10, 12 ("I live . . . next door to the home owned by Douglas Sardonell . . . . I observed that shortly after Charlene Sardonell rented her home to an African American family, cars marked with the City of Powder Springs emblem began surveilling [Douglas' house]."") (sworn to Jan. 5, 2001);

G. Powell Aff. ¶¶ 2, 11-14 (same) (sworn to Dec. 26, 2000); Affidavit of Sheila Powell ¶¶ 7-9 (same) (sworn to Dec. 18, 2000).

It is undisputed that this investigation was initiated upon the lone complaint of – yes, City Councilman Gary Noriega. (*See* Deposition of respondent City Manager Wayne Wright individually ("Wright indiv. Depo."), at 18 ("Q. From whom did you receive the complaints [against the Sardonells and A Cool Flame that caused you to open the investigation]? A. I believe Councilman Noriega called me. Q. Other than Councilman Noriega, who else did you receive complaints from? A. I don't recall any others.")); *id.* at 20-21 ("Q. Did you receive any other complaints regarding the Sardonells or any of their business activities, other than Mr. Noriega's complaint? A. Mr. Noriega contacted me several times about the situation. Are you talking about from other individuals? Q. Yes. A. No, not that I recall."); Deposition of Lieutenant James E. Freeland at 62-63 ("Q. Do you know of any complaints that have come to the police department [about the Sardonells]? A. Not that I'm aware of.")).

Specifically, it is undisputed that City Councilman Noriega telephoned respondent City Manager Wayne Wright, who reports to the City Council (Wright indiv. Depo. at 16), and Noriega told Wright that "he [Noriega] had been getting complaints from neighbors" about business activities at Douglas' house. (Wright indiv. Depo. at 20; *see* Noriega Depo. at 38 ("I called Mr. Wright, our City manager. I said, 'Wayne, I have received a complaint.' "). When Noriega was asked at his deposition to identify who complained to him against A Cool Flame and the Sardonells, he could cite only the following:

> [M]y wife told me that her mother [Ms. Murphy above] had told her that Mary Sitherwood [a neighbor of Ms. Murphy] had told her that she was tired of the vans being up in the Sardonells' yards and whatever. . . . Ms. Sitherwood had told Ms. Murphy – because they're big buddies – had told Ms. Murphy would she let Gary know that there's a lot of activity going on up at the Sardonells because I can't see their house from where I live. I can't see it front or back. So I don't know what's going on up there.

Noriega Depo. 37-38; *id.* at 51-52 ("Q. . . . Other than the initial complaint that you received by way of your wife, were there any other complaints that you received about activities at the Sardonells' home? A. The Sardonells? No."); *id.* at 61).

Noriega's allegation that he requested Wright to investigate based on this purported "complaint" lacks any credibility – or certainly a reasonable factfinder could so conclude. First, according to Noriega's own testimony, Mary Sitherwood herself admitted in the "complaint": "I can't see [the Sardonells'] house from where I live. I can't see it front or back. So I don't know what's going on up there." (*Id.*) Moreover, as alleged by Noriega, the "complaint" is third-hand – via his wife, via her mother. (*Id.*) Noriega concedes he never spoke personally with Ms. Sitherwood about the purported "complaint." (*Id.* at 47).

And most importantly, in their own depositions, *Mary Sitherwood and Murphy – both – deny that the alleged "complaint" ever was made.* (Deposition of Murphy at 41 ("Q. You've heard of no complaints by neighbors regarding activities at the Sardonells' home, correct? A. Correct."); Deposition of Mary Sitherwood at 25 ("Did you

ever tell Mrs. Murphy that you needed to have anything done about anything going on at Douglas Sardonells' home regarding activities? A. No."; "Q. Did you ever imply to Mrs. Murphy that you needed or wanted to have anything done about activities going on at Douglas Sardonell's home? A. No.")).

As unfounded as was Noriega's complaint to Wright, so did Noriega foment the investigation with even greater zeal. It is undisputed that after Charlene rented her house to African Americans, Noriega "several times" raised the subject of alleged business activities at the Sardonells' home with City Manager Wright and "at different work sessions of the city council." (Wright indiv. Depo. at 21 ("Mr. Noriega contacted me several times about the situation."); Deposition of Wayne Wright pursuant to F.R.Civ.P. 30(b)(6) ("Wright 30(b)(6) Depo.") at 62 ("I recall Mr. Noriega raising the issue that the violations had continued or were ongoing at different work sessions of the city council."); *see also* Wright indiv. Depo. at 22 ("Q: And then you remember a planning meeting with the city council, in which Mr. Noriega complained about the Sardonells; is that correct? A: Yes.")).

On January 25, 1999, respondent City Code Compliance Officer Vince Blackmon sent a letter to the Sardonells alleging, "[t]here have been *continuous complaints* to the City concerning business vehicles parked on your premises; also, numerous deliveries."[2] However, the City officials' admissions and the other testimony above bring

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[2] (Letter dated Jan. 25, 1999 from Vince Blackmon to Douglas Sardonell (Exh. D-5 to D. Sardonell Depo.) (emphasis added))

to light that the complaints against the Sardonells originated only with City Councilman Noriega. *See* pp. 6-9 *supra*. It is undisputed that the Sardonells could have one business vehicle and receive four or fewer deliveries a month at Douglas' house, pursuant to Douglas' business license. City of Powder Springs, Zoning District Regulations § 7.07.02.02.05 (one business vehicle permitted); § 7.07.02.02.08 (four or fewer deliveries a month permitted); (Plaintiffs' Exhibit Wright # 3 to Wright indiv. Depo.). Although on some occasions a second vehicle for business purposes had been parked at Douglas' home, from well before Charlene rented her home to black citizens, the affidavits of the Sardonells' neighbors above, and the respondents' admissions, give rise to a reasonable inference that respondents were willing to allow this so long as Charlene's house was not being rented to black citizens. *See* pp. 6-9 *supra*. The Sardonells' neighbors have never complained about a second business vehicle being parked on some occasions at the Sardonells' home. They aver seeing only one business vehicle there on a regular basis. (Long Aff. ¶ 9 ("It is my personal observation that in 1998 and 1999 only one van marked as a business vehicle was parked at the home of Douglas Sardonell on a regular basis."); G. Powell Aff. ¶ 5 ("I saw in 1999, on a regular basis, only one van marked with Douglas Sardonell's business logo and parked at this location.")). The neighbors further aver that there was no significant loading and unloading of materials at the Sardonells' home. (Long Aff. ¶ 5 ("During the period between 1998 and 1999, I did not observe any significant loading of any materials at [Douglas' home]."); G. Powell Aff. ¶ 5 ("[B]etween 1995 and 1999, I observed no significant or ongoing loading or unloading of materials at [Douglas' house]")).

In order to bring a stop to the surveillance and the unfounded accusations, the Sardonells requested a land use permit for Douglas' home, to put the matter to rest. This brought Douglas and Charlene before the City Council on March 1, 1999, and neighbors of the Sardonells attended the City Council meeting in their support. (Transcript of March 1, 1999 City Council Meeting pp. 1-2 (Exh. A to [First] Affidavit of Betty Brady, City Clerk, City of Powder Springs (sworn to Dec. 8, 2000)); and Noriega Depo. at 75). In the meantime, a commercial location from which he could conduct the business of A Cool Flame in Powder Springs was identified by Douglas, and at the March 1, 1999 City Council meeting, Douglas and Charlene explained to the City Council:

> [Charlene:] We have located and will be moving into a commercial place April first. . . . [W]e really don't need to be getting letters and phone calls for the next thirty days. . . . [Douglas:] [W]e want the harassment stopped because we have been harassed. . . . [W]e need to have them stop bothering us because we don't bother anybody.

(Transcript of March 1, 1999 City Council Meeting, p. 1). When Charlene further informed the City Council at its meeting on April 5, 1999 that Douglas' business had moved as of April 1, 1999, the matter was closed. (Transcript of April 5, 1999 City Council Meeting, pp. 1-4 (Exh. A to [Second] Affidavit of Betty Brady (sworn to Dec. 8, 2000))).

Or so the Sardonells thought.

During the week of April 12, 1999, City Councilman Noriega again called City Manager Wright about the Sardonells (Wright indiv. Depo. at 39-40), and at the City Council's work session on Wednesday, April 14, City

Councilman Noriega introduced the issue of taking some action against the Sardonells. (Wright indiv. Depo. at 81 ("I remember at the work session, when Mr. Noriega raised the issue [of "tak[ing] action against the Sardonells"] the week the citation was issued."); *see id.* at 25-28).

City Manager Wright then immediately surveilled the Sardonells' home. (See text immediately below). Wright had personally surveilled the Sardonells' home many times before this, but he concedes he does not remember seeing any violations of city ordinances on these prior occasions. (G. Powell Aff. ¶ 12 ("I observed Wayne Wright often driving a City of Powder Springs vehicle and surveilling the Sardonell home in late 1998 and 1999, including many weekends."); Wright indiv. Depo. at 74 ("A. . . . I went by [Douglas' house] prior to the land use permit hearing [March 1, 1999] . . . [a]nd I may have been by earlier as well. Q: Do you recall what you observed when you went by, other than in April of '99. A: I don't remember seeing any – well – I don't remember. I don't remember seeing any violations. . . . Q: You don't remember any violations? A: No. . . . ")).

Wright contends, however, that when he surveilled the Sardonells' home for "a few minutes," *after* the phone call from Noriega and the City Council work session on April 14, 1999, he as well as two of his employees saw several business vehicles and other activities on Douglas' property. (Wright 30(b)(6) Depo. at 22-24, 48; Wright indiv. Depo. at 39-41)).

Based on this alleged observation, on April 16, 1999 the City of Powder Springs Police Department issued a citation at Douglas' home to Charlene alleging that she

had operated a business without a license. (Wright indiv. Depo. at 76). It is undisputed that the citation was issued upon the personal request of City Manager Wright. Specifically, Wright telephoned the City of Powder Springs Chief of Police, who reports to Wright, and "asked the chief of police to issue a citation." (Wright indiv. Depo. at 109). Wright admitted at his deposition that he has never before or since personally requested that the Chief of Police issue a citation against anyone. (*Id.* at 112) ("Q: The question is: Can you tell me that you have ever, other than with the Sardonells, requested directly – you, yourself – that the chief of police have a citation issued to a citizen for a violation of a city ordinance? A: And I think I've clearly answered that question. Q: Answer the question "yes" or "no," please, sir. A: No.").

The Chief of Police in turn directed Lieutenant James Freeland to issue the citation. (Freeland Depo. at 46-47). As Lieutenant Freeland explained in his deposition, he had patrolled the Sardonells' street once a week during 1999 and, based on those patrols, he "had no reason to be concerned about any illegal activities at [Douglas' house]." (*Id.* at 35-37). Lieutenant Freeland responded to the Chief's instruction to issue the citation: " 'Well, I don't know what this is,' and the chief reminded me – well, basically what it comes down to is a police officer has to obey any lawful order given to him by a superior, okay? . . . I was to go cite the Sardonell residence. . . . So that's what I did." (*Id.* at 46-47).

When Charlene requested a jury trial of the charge, the case against her was bound over to State Court of Cobb County, Georgia (from Powder Springs Recorder's Court). (*E.g.*, Wright 30(b)(6) Depo. at 58). Charlene then

endured months with the charge left hanging over her head until – more than one year after the original citation had been issued and was still not resolved – new charges issued against Charlene. This time the charges were that Charlene had parked business vehicles on the premises of Douglas' house. (Waiver of Formal Arraignment and Notice of Return, State Court of Cobb County, Case # OOM2078 (April 19, 2000)). These criminal charges against Charlene carried penalties of "up to 12 months incarceration and/or a $1,000 fine or any combination of the two." *Id.* And Charlene had to endure having these charges hanging over her for yet another four months, *until the independent Cobb County solicitor's office dropped the charges. See* Entry of Nolle Prosequi, Aug. 14, 2000, State Court of Cobb County, Cobb Judicial Circuit (Glover, J.).

The City of Powder Springs would give the Sardonells no rest – none. Immediately upon Douglas' moving A Cool Flame to a business location on April 1, 1999, new obstacles were erected there by the City to Douglas' lawful use and enjoyment of the commercial property in Powder Springs. Specifically, as the commercial landlord avers in his affidavit:

> After Douglas Sardonell leased the rental location, I was told by a City of Powder Springs official . . . that I would have to obtain a Certificate of Occupancy, including a Fire Marshall Certificate, if I wanted to continue to lease the rental location to Douglas Sardonell. Prior to my leasing the rental location to Douglas Sardonell, I had never been requested to obtain such a Certificate of Occupancy or Fire Marshall Certificate for any tenant.

McTyre Aff. at ¶¶ 3-4.

After "just a little over a month" at this new location, Douglas determined it was best to move A Cool Flame out of Powder Springs altogether, to Smyrna, Georgia. (Douglas' Depo. at 20). The harassment by respondents had become too great. Sadly, the resulting need to move Douglas' business during the onset of the spring/summer air conditioning season in Georgia limited the business' growth. (*Id.* at 77). Even so, the surveillance activities by the City of Powder Springs continued for months after A Cool Flame was moved out of Powder Springs, as the Sardonells' neighbors confirm. (*See* Long Aff. ¶ 11 ("I continue to see cars marked with the City of Powder Springs emblem, which continue to survey the home of Douglas Sardonell.") (sworn to Jan. 5, 2001); G. Powell Aff. ¶ 14 ("I, as of this day, continue to observe City of Powder Springs vehicles driving by and surveilling the Sardonell home on a weekly basis.") (sworn to Dec. 26, 2000); S. Powell Aff. ¶ 8 ("I have observed that surveillance of Douglas Sardonell's home continues on a regular basis, and that surveillance of this home is being done by individuals driving City of Powder Springs vehicles.") (sworn to Dec. 18, 2000); *see also* D. Sardonell Aff. ¶ 26 ("[S]urveillance of my home continues to this day, despite the fact that my business operations were moved out of the City of Powder Springs in May of 1999.") (sworn to Jan. 8, 2001)).

One further, sad piece of evidence attesting to a racial basis for City code compliance actions in Powder Springs is provided by an African-American gentleman who lives in the same subdivision as the Sardonells, Edward Harper. Mr. Harper explains:

> ¶ 4. I [have been] issued two (2) letter warnings by Code Compliance Officer Vince Blackmon for having grass that was too tall.
>
> ¶ 5. In my observation, there was no difference in the height of my grass and other neighbors who were of the Caucasian race who lived on my block.
>
> ¶ 6. To the best of my knowledge, none of my Caucasian neighbors were ever given warnings by City officials for having grass that was too tall.

Affidavit of Edward Harper ¶¶ 4-6 (sworn to Jan. 8, 2001).

The record amply permits a reasonable factfinder to conclude that City Councilman Gary Noriega, City Manager Wayne Wright and City Code Compliance Officer Vince Blackmon engaged in a pattern of racially motivated discrimination against Douglas and Charlene Sardonell by means of frequent surveillance, unfounded accusations, and criminal charges that were later dropped by an independent prosecuting authority, all for the purpose of punishing Charlene's having exercised her right to lease her home to black citizens.

The District Court's Summary Judgment Order

Petitioners instituted this federal civil rights action in the federal district court for the Northern District of Georgia, Atlanta Division, alleging that the respondents' actions violated the federal civil rights statutes, 42 U.S.C. §§ 1981, 1982, 1983 and 1985, and the Fair Housing Act,

42 U.S.C. § 3604.[3] Named as defendants were respondents City Councilman Noriega, City Manager Wright, and City Code Compliance Officer Vince Blackmon, in their official capacities and individually; the City of Powder Springs; and others.

After other pre-trial proceedings, the district court (Carnes, J.) entered summary judgment for respondents on all counts. A single theme unified the district court's reasoning in rejecting every one of petitioners' claims under the federal civil rights statutes above: *a supposed lack of standing* for petitioners Douglas and Charlene – as white citizens – to avail themselves of the fundamental protections afforded by the federal civil rights statutes even though they had alleged discrimination against them because Charlene rented her house to black citizens. App. 30-31 ("Plaintiffs . . . appear to be alleging that they were discriminated against . . . because they entered into a contract with a black person. Plaintiffs have not cited any case law allowing this sort of 'association' claim under § 1981."); App. 31-32 ("[P]laintiffs' situation would not appear to fit within the scope of a § 1982 claim. In a typical § 1982 claim, a plaintiff must show . . . that he is a member of a racial minority . . . "); App. 33-34 ("§ 1985(3) . . . was intended to encompass only those conspiracies motivated by animus against the kind of classes Congress was trying to protect. . . . Plaintiffs have not alleged that they were a member of a class discriminated against. . . . Accordingly, plaintiffs' section 1985 claim fails as well."); App. 22-23 ("[I]t would seem that

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[3] Petitioners further alleged violations of the Fourteenth Amendment's Due Process and Equal Protection Clauses. U.S. Const. amend. XIV § 1.

plaintiffs lack any standing to bring a FHA claim [sic]. . . . Plaintiffs . . . have failed to provide one cite to a case in which this sort of claim was cognizable under the FHA.").

Moreover, in rejecting petitioners' § 1982 claim in particular, the district court relied solely on the supposed lack-of-standing rationale described and quoted above. (App. 31-32).

The Eleventh Circuit Proceedings

In a brief order, the Eleventh Circuit affirmed. The Eleventh Circuit approved, without significant analysis, the district court's decision as "a carefully drawn order of 37 pages." App. 2. The Eleventh Circuit mentioned only in passing petitioners' claims under the federal civil rights statutes, including § 1982. App. 2-4.

In particular, even though petitioners devoted over three pages of their opening brief in the court of appeals to the critical point that they, as white citizens, nevertheless had standing to sue under the federal civil rights statutes (*see* Brief of Appellants at 29-32), the Eleventh Circuit let stand without even a comment the district court's conclusion that petitioners, as white citizens, were without standing to obtain redress for discrimination against them because Charlene rented her home to black citizens. The Eleventh Circuit failed to address or correct the district court's reasoning, in particular, as to petitioners' claim under 42 U.S.C. § 1982, even though no alternative reason had been given by the district court as to why petitioners' § 1982 claim should not be allowed to proceed to trial.

A timely petition for rehearing and rehearing en banc was denied without comment.

REASONS FOR GRANTING THE WRIT

The Eleventh Circuit's Decision Conflicts with *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969) and Should Be Summarily Reversed.

In *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), this Court held that "there can be no question but that" a white citizen who has been discriminated against because he has rented property to a black citizen "has standing to maintain [an] action" under 42 U.S.C. § 1982. *See* 396 U.S. at 237 (citing *Barrows v. Jackson*, 346 U.S. 249, 259 (1953)). The discriminatioin against the white lessor in *Sullivan* took the form of expulsion from a local recreational facility. *Id.* at 235-36. The Court reasoned that it was imperative, in order to achieve the purposes of § 1982, for the white lessor to have standing under the statute:

> If [a] sanction, backed by a state court judgment, can be imposed, then Sullivan is punished for trying to vindicate the rights of minorities protected by § 1982. Such a sanction would give impetus to the perpetuation of racial restrictions on property. That is why we said in *Barrows v. Jackson*, 346 U.S. 249, 259 . . . that the white owner is at times 'the only effective adversary' of the unlawful restrictive covenant.

396 U.S. at 229; *see Des Vergnes v. Seekonk Water Dist.*, 601 F.2d 9, 14 (1st Cir. 1979) ("[T]o invoke § 1981 or § 1982 one need not be a member of the racial class protected by

the statute.") (citing *Sullivan*); *Cutting v. Muzzey*, 724 F.2d 259, 259-61 (1st Cir. 1984) ("[T]he district court erred in dismissing [this federal civil rights] action for lack of standing" where the plaintiff housing developer alleged that the defendant town planning board's imposition of "outrageous conditions" on the developer's subdivision construction project, "was motivated by racial animus towards the plaintiff's purchasers, all of whom had Italian surnames."); *Dale v. City of Chicago Heights*, 672 F. Supp. 330, 331 (N.D. Ill. 1987) ("In Counts I and II, plaintiffs, a white couple, allege that defendants violated 42 U.S.C. §§ 1981 and 1982 through a pattern of conduct designed to punish the plaintiffs for, and interfere with, the rental of their property to black tenants. . . . Counts I and II do set forth claims upon which relief may be granted.") (citing *Sullivan* and *Barrows*); *Pisello v. Town of Brookhaven*, 933 F. Supp. 202, 215-16 (E.D.N.Y. 1996) (Plaintiff developer "alleges that he was subject to ongoing harassment by the defendants as a result of his providing housing to low income minorities. . . . [T]hese allegations fall under the penumbra of section 1981 cases in which the non-minority plaintiff is retaliated against as a result of his failure to discriminate in the contractual context.") (collecting authorities).

Sullivan applies with even greater force here. The respondents – City Councilman Noriega, City Manager Wright, City Code Compliance Officer Blackmon, and the City proper – wield governmental power, not mere private social power as did the private recreational facility in *Sullivan*. The respondents issued a citation and pressed criminal charges against Charlene, carrying the possibility of one (1) year in prison and/or a $1000 fine each.

After making Charlene endure a delay of months awaiting resolution of the charges, finally the charges were dropped by the *independent* Cobb County solicitor's office. *See* p. 14 *supra*. If the discriminatory harassment inflicted on petitioners by these respondents goes unredressed, respondents will be confirmed of their ability to escape the federal civil rights statutes in the future, and petitioners or other property owners in respondents' jurisdiction will be deterred – or further deterred – from renting their homes to anyone except whites. Members of minority groups who would have otherwise considered moving into respondents' jurisdiction will be hampered or deterred from doing so because of discrimination against them by would-be landlords. As petitioners argued in the court of appeals, moreover: "[T]he potential class of litigants challenging such unlawful conduct would be limited to those who are very often the most intimidated, and who possess the least opportunity to challenge such violations of the law: a result the drafters of these federal laws surely did not intend." Brief of the Appellants [in the Eleventh Circuit] at 31. The purposes sought to be served by the federal civil rights statutes relating to nondiscrimination in the transfer of property will have been utterly thwarted in the City of Powder Springs, Georgia.

As described above, the only reason given by the district court for rejecting petitioners' § 1982 claim – that whites lack standing to sue under § 1982 for discrimination against them because they rented to blacks – is absolutely wrong under this Court's established precedent. *See Sullivan, supra*. Yet the Eleventh Circuit necessarily approved this major tenet of the district court's

"reasoning" – it being *the* central premise of what the Eleventh Circuit heralded as the district court's "carefully drawn order of 37 pages." App. 2; *see* pp. 17-18 *supra*. The Eleventh Circuit never addressed petitioners' § 1982 claim as distinct from several of petitioners' other claims. The court of appeals stated in the final two sentences of its order: "We have reviewed the other counts and specific allegations. The record does not support a finding that the district court committed reversible error." App. 4. First, this begs the question – what did the court of appeals understand the law to be, in the light of which it reviewed the record? Certainly, if the Eleventh Circuit accepted the district court's central legal conclusion – as the Eleventh Circuit's order affirming the decision dictates that it did (applauding the "district court's carefully drawn order of 37 pages") – the Eleventh Circuit's conclusion that the record somehow does not support a § 1982 claim is utterly without merit. As described above, the record more than permits a reasonable factfinder to infer that the respondents have engaged in racially motivated punishment of the Sardonells because of Charlene's exercise of her right to rent her house to black citizens.

Second, it is evident from the the Eleventh Circuit's order that the court's review of the record was not careful or conducted in the light most favorable to the Sardonells. Specifically, the order is inaccurate and misleading in stating that the Sardonells attended "numerous city council meetings . . . [but] never mentioned . . . any retaliatory measures being taken against them by the City." App. 4. First, the record plainly shows that the criminal charges against Charlene – the most egregious retaliatory actions – were filed *after* the two City Council meetings. *Compare*

p. 11 *supra* (the City Council meetings were on March 1, 1999 and April 5, 1999) *with* pp. 12-14 *supra* (citation issued April 16, 1999; other charges issued April 19, 2000). Second, the transcripts of the City Council meetings show plainly that, at the March 1, 1999 City Council meeting, the Sardonells vigorously objected to many of the City's retaliatory actions as of that date. *See* p. 11 *supra* (quoting Douglas and Charlene). Charlene attended the April 5, 1999 City Council meeting alone, in order to confirm to the City Council that Douglas' business had moved on April 1, 1999, as previously discussed with the City Council on March 1, 1999, in order to bring an end to the City's harassment, which end sadly was not forthcoming.

Had the City of Powder Springs imposed a formal tax on rentals of property to black citizens, the tax law or any enforcement thereof would clearly violate § 1982, and could successfully be challenged in an action brought by a white landlord under *Sullivan* above. The harassment of petitioners here by respondents is every bit as powerful as a formal "tax" – perhaps more so because it is more clandestine – in deterring and penalizing property rentals to black citizens. "The right to 'lease' is protected by § 1982 against the actions of third parties," 396 U.S. at 237, such as respondents here. The district court should have permitted the Sardonells to proceed to trial on their § 1982 claim; certainly summary judgment should not have been granted and affirmed on the basis of the fundamental misconception that § 1982 does not permit a white person to sue.[4]

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[4] The district court – in language nowhere adverted to by the Eleventh Circuit – suggested that the individual

The more things have changed, the more they have stayed the same. The State of Georgia was in times past a

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respondents (defendants in the district court) were entitled to "qualified immunity" because they were not acting contrary to clearly established law. App. 29 n.13. However, as *Sullivan* shows, the law is clearly established against respondents' wrongful actions and, therefore, respondents have no entitlement to qualified immunity. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); *see also Pisello*, 933 F. Supp. at 219 ("[T]he individual defendants are not entitled to qualified immunity. The Amended Complaint alleges that the individual defendants conspired to run [plaintiff developer] out of business because he places low income minority families in their community. In the Court's view, these allegations lay at the heart of this federal civil rights case. As stated above, the fact that the plaintiff is white does not alter this conclusion.").

The district court further suggested that respondent Noriega was entitled to "legislative immunity" to the extent he was "ruling on zoning and land issues." App. 29 n.13. However, as detailed above, none of Noriega's conduct insofar as relevant to petitioners' § 1982 claim involves any "ruling on zoning and land use issues." *See* pp. 5-15 *supra*. Accordingly, legislative immunity lends Noriega no relief.

Lastly, the district court suggested that petitioners could not establish municipal liability against respondent City of Powder Springs under *Monell v. Department of Soc. Services*, 436 U.S. 658, 690 (1978). App. 29 n.13. This suggestion lacks any merit as well. Petitioners more than satisfy the *Monell* criteria. Under *Monell*, "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. 658, at 694. In light of the record above, the actions and directives of City Councilman Noriega, City Manager Wright, and City Code Compliance Officer Blackmon against petitioners "may fairly be said to represent official policy." *Id.*; *see also Pembaur v. Cincinnati*, 475 U.S. 469, 480-81 (1986) ("[W]here action is directed by those who establish

bastion of the Confederacy with all for which it stood. During the Reconstruction era and until near modern times, segregation and discrimination prevailed. Today, one might have hoped that a case like this would not arise. It has. The breadth of protection afforded by Congress in § 1982 to citizens victimized by racial discrimination in leasing property – white or black – has been rendered nugatory by the district judge's crabbed surmise as to the scope of the federal civil rights statutes, and three judges of the United States Court of Appeals for the Eleventh Circuit have failed to find this fundamental, pervasive error in the district court's opinion worthy of reversal or mention.

Where a court of appeals' decision conflicts with the established law of this Court, this Court will grant the writ of certiorari and summarily reverse the lower court's decision, even where the lower court's decision is unpublished. *See, e.g., Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504, 505 (2001) (*per curiam*) ("Because the Court's determination conflicts with our cases . . . we grant the petition for a writ of certiorari and reverse."), *reversing*, 2000 WL 1801383 (9th Cir. Dec. 7, 2000) (*per curiam*) (unpublished), judgt. order reported at 243 F.3d 547; *Clark County School Dist. v. Breeden*, 532 U.S. 268, 270 (2001) (*per curiam*) (where court of appeals' ruling was contrary to "what was plain from our previous decisions," petition for certiorari granted and court of

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governmental policy, the municipality is equally responsible whether that action is to be taken only once or to be taken repeatedly. To deny compensation to the victim would therefore be contrary to the fundamental purpose of § 1983.").

appeals' judgment reversed), *reversing*, 2000 WL 991821 (9th Cir. July 19, 2000) (*per curiam*) (unpublished), judgt. order reported at 232 F.3d 893; *see also Sao Paulo State of Federative Republic of Brazil v. American Tobacco Co., Inc.*, 122 S. Ct. 1290, 1292 (2002) (*per curiam*) ("[T]his case is easily disposed of. . . . The Fifth Circuit's decision is inconsistent with *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 . . . (1988). . . . Accordingly, we grant the petition for certiorari, reverse the judgment of the Court of Appeals, and remand the case for proceedings consistent with this opinion."); *Arkansas v. Sullivan*, 532 U.S. 769, 771 (2001) (*per curiam*) ("Because the Arkansas Supreme Court's decision on rehearing is flatly contrary to this Court's controlling precedent, we grant the State's petition for a writ of certiorari and reverse."); *Ohio v. Reiner*, 532 U.S. 17, 21 (2001) (*per curiam*) ("The Supreme Court of Ohio's determination that [the defendant] did not have a valid Fifth Amendment privilege . . . clearly conflicts with [our cases]. . . . [T]he petition for a writ of certiorari is granted, the court's judgment is reversed, and this case is remanded for further proceedings not inconsistent with this opinion.").

For the sake of petitioners Douglas and Charlene Sardonell, of citizens who reside or who would choose to reside in Powder Springs if housing were available to them on a non-discriminatory basis, and of other plaintiffs who may encounter the same federal courts in future civil rights matters, this Court should grant the petition, summarily reverse the judgment of the Eleventh Circuit to the extent that it affirms the entry of summary judgment on petitioners' § 1982 claim (and petitioner's § 1983

claim insofar as it is premised on their § 1982 claim[5]) and remand the case for further proceedings.

CONCLUSION

This Court should grant the petition, summarily reverse in part the Eleventh Circuit's judgment as to petitioners' § 1982 claim and its § 1983 claim insofar as premised on the § 1982 claim, and remand the case for further proceedings.

Respectfully submitted,

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[5] Section 1983 of course does not provide a substantive right of itself, but rather "provides a method for vindicating federal rights elsewhere conferred" such as in § 1982. *Graham v. Connor*, 490 U.S. 386, 393-94 (1989).

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12824
Non-Argument Calendar

D.C. Docket No. 99-01921-CV-JEC-1

EVA CHARLENE SARDONELL,
DOUGLAS SARDONELL,

Plaintiffs-Appellants,

versus

GARY NORIEGA, individually and
as Council Member, City of Powder Springs,
WAYNE WRIGHT, individually and as City
Manager, City of Powder Springs,
RICHARD SAILORS, individually and as
Mayor, City of Powder Springs,
VINCE BLACKMON, individually and as
Code Compliance Officer,
CITY OF POWDER SPRINGS,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Georgia

(Filed December 18, 2001)

Before CARNES, HULL and GODBOLD, Circuit Judges.

PER CURIAM:

Plaintiffs are landlords and business owners in the City of Powder Springs, Georgia. They have filed this action against The City of Powder Springs, Georgia; Gary Noriega, individually and as Council Member; Wayne Wright, individually and as City Manager; Richard Sailors, individually and as Mayor; Vince Blackmon, individually and as Code Compliance Officer.

Plaintiffs allege in count I that Defendants were guilty of acting in concert and under color of state law to conspire to deny Plaintiffs the right to rent their residence to individuals without regard to race in violation of 42 U.S.C. § 3604. Count II alleges Defendants' conduct is actionable under 42 U.S.C. § 1983 as a violation of Plaintiffs' right to equal protection and substantive due process and their right not to be deprived of property rights without procedural due process of law. Count III alleges that Defendants' conduct is actionable under 42 U.S.C. § 1981 as a violation of Plaintiff's right to equal protection under the laws and their right to make and enforce contracts without regard to race. Count IV alleges that Defendant's conduct is actionable under 42 U.S.C. § 1982 as a violation of Plaintiff's right to equal protection under the laws and their right to buy, sell, or lease property without regard to race. Count V alleges Defendants conspired to deprive Plaintiffs of their constitutional rights to equal protection and due process of law in violation of 42 U.S.C. § 1985.

Defendants moved for summary judgement. The court considered the arguments. It entered a carefully drawn order of 37 pages granting Defendants' motion.

The basis of the order is that there was no connection between the alleged acts and a violation of the Fair Housing Act, or 42 U.S.C. §§ 1981, 1982, 1983 and 1985. Plaintiffs appeal. We affirm.

In Defendants' motion for summary judgment they argued that Plaintiffs failed to state a cognizable claim under the Fair Housing Act. The district court agreed. On appeal Plaintiffs say that they identified specific portions of the Fair Housing Act and then stated facts which supported their claim. Therefore they have stated a cognizable claim under the Fair Housing Act. They are wrong.

In their brief Plaintiffs cite to their Memorandum and Opposition to Defendants' Motion for Summary Judgment for the proposition that they cited the relevant Fair Housing Act provisions. In their memorandum Plaintiffs cite 42 U.S.C. § 3604(2), (3), and (5). However, these subsections do not exist. After carefully comparing the Plaintiffs' memorandum and brief to the Fair Housing Act the court concluded that the appropriate cites were 42 U.S.C. § 3604(a), (c), and (e).[1]

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[1] 42 U.S.C. § 3604 states in its relevant part: "it shall be unlawful – (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race . . . (c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race . . . (e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race."

Plaintiffs then attempt to support the above allegations with evidence that the City of Powder Springs retaliated against them for renting to non-whites. One of the alleged retaliations was that the City sent Plaintiffs a letter stating that they were in violation of the City's home occupation business license. During numerous city council meetings regarding the home occupation business license Plaintiffs never mentioned the Fair Housing Act or any retaliatory measures being taken against them by the City.

In the district court Plaintiffs alleged other retaliatory acts. However they did not cite in the district court or in this Court any case law or other relevant authority that the type of alleged retaliation they assert is cognizable under the Fair Housing Act. We cannot say that the district court erred in granting Defendants' summary judgment motion regarding the Fair Housing Act.

Plaintiffs allege that the district court erred in failing to allow them to file an amended complaint and a second amended complaint. They also assert that the district court erred in deciding not to strike portions of Defendants' Brief in Support of the Motion for Summary Judgment. Specifically Plaintiffs argue that the brief was replete with citations that were not in appropriate form because they contained the incorrect court, date and case reporter or this information was missing. These arguments are without merit.

We have reviewed the other counts and specific allegations. The record does not support a finding that the district court committed reversible error.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

EVA CHARLENE SARDONELL and DOUGLAS SARDONELL,	)	CIVIL ACTION NO.
Plainitffs,	)	1:99-CV-1921A-JEC
v.	)	
GARY NORIEGA, individually and as a Council Member, City of Power Springs, WAYNE WRIGHT, individually, and as City Manager, City of Powder Springs, RICHARD SAILORS, individually, and as Mayor, City of Powder Springs, VINCE BLACKMON, individually, and as Code Compliance Officer, City of Powder Springs, and the CITY OF POWDER SPRINGS,	)	
Defendants.	)	

ORDER

(Filed April 19, 2001)

This case is presently before the Court on plaintiffs' Motion for Leave to File a Second Amendment to Complaint [48], defendants' Motion for Summary Judgment [50], plaintiffs' Motion to Strike Portions of Defendants' Brief [60], plaintiffs' Motion for Hearing on Defendants' Motion for Summary Judgment [61], plaintiffs' Motion for

Leave of Court to File Excess Page Limitation [65], and plaintiffs' Motion to Continue Consideration of Defendants' Motion for Summary Judgment [66]. The Court has reviewed the record and the arguments of the parties and, for the reasons set out below, concludes that plaintiffs' Motion for Leave to File a Second Amendment to Complaint [48] should be **DENIED**, defendants' Motion for Summary Judgment [50] should be **GRANTED**, plaintiffs' Motion to Strike Portions of Defendants' Brief [60] should be **DENIED**, plaintiffs' Motion for Hearing on Defendants' Motion for Summary Judgment [61] should be **DENIED**, plaintiffs' Motion for Leave of Court to File Excess Page Limitation [65] should be **GRANTED**, and plaintiffs' Motion to Continue Consideration of Defendants' Motion for Summary Judgment [66] should be **DENIED AS MOOT**.

BACKGROUND

Plaintiffs Charlene and Douglas Sardonell are husband and wife. (compl. [1] at ¶ 2.) They are white citizens of Cobb County, Georgia, residing in Powder Springs, Georgia. (Defs.' stmt. of Mat. Facts as to Which There Is No Dispute [50] at ¶ 1.)[1] Mr. Sardonell owns a home

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[1] The local rules of this district require the nonmovant of a motion for summary judgment to respond to each of the movant's numbered material facts. The rules state, "All material facts contained in the moving party's statement which are not specifically controverted by the respondent's statement should be deemed admitted." LR 56.1.B.(2), NDGa. Nonetheless, rather than comply with this rule, plaintiffs simply filed their own statement of material facts, which makes no reference to defendants' statement. While the Court could deem all of

located at 3891 Blythewood Circle, Powder Springs, Georgia (hereinafter the "3891 house"), and Mrs. Sardonell owns a home located at 3890 Blythewood Circle, Powder Springs, Georgia (hereinafter the "3890 house"). (*Id.* at ¶¶ 2-3.) Since 1995, the Sardonells have operated a family business, "A Cool Flame Heating and Air, Inc.," from the 3891 house. (*Id.* at ¶¶ 4, 6; Pls.' Stmt. of Mat. Facts [58] at ¶ 8.) Mr. Sardonell has held a business license for this business since 1995. (*Id.* at ¶ 5; *Id.* at ¶ 8.) Because the Sardonells were operating the business from a residence, they were required to have a Customary Home Operation License.[2] (Comp. [1] at ¶ 9.) Plaintiffs state that they possessed such a license and operated their business without interference from the defendants up until September 1998. (*Id.*)

In September 1998, Mrs. Sardonell rented the 3890 house to an African-American family, pursuant to Section 8 of the United States Department of Agriculture Housing Program. (Defs.' Stmt. of Mat. Facts [50] at ¶ 35; Pls.' Stmt. of Mat. Facts [58] at ¶ 7.) Plaintiffs allege that prior to renting to this family, they were approached by a neighbor, Betty Jo Murphy, who requested that they

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defendants' facts admitted, it will make an attempt to discern which facts plaintiffs intended to deny. Facts to which plaintiffs made no response, however, are deemed admitted.

[2] The City of Powder Springs allows individuals to conduct the business of certain "customary home occupations" without obtaining a land use permit for operating a business in a residential area. The local ordinance lists twelve criteria for operating as a customary home based business, including restrictions on signage, vehicles, deliveries, and employees at the house. (Br. in Supp. of Mot. for Summ. J. [17] at Ex. B.)

refrain from renting to a non-white family. (Pls.' Stmt. of Mat. Facts [58] at ¶ 8.) Murphy, defendant Gary Noriega's mother-in-law, allegedly stated that she could assist them in finding legal mechanisms to avoid renting to non-whites. (*Id.*) Plaintiffs further allege that Murphy later told another neighbor, Gordon Powell, that she was going to "see what Gary could do about" the Sardonells renting through the Section 8 program. (*Id.* at ¶ 10.)

Plaintiffs claim that immediately after renting the 3890 house, they began to receive communications from the City of Powder Springs (hereinafter "the City") that they were in violation of the City's home occupation license in regard to the heating and air business. (*Id.* at ¶ 11.) Plaintiffs admit that the City claimed that they had received complaints about the activities at the 3891 house. (*Id.*)[3] Plaintiffs claim that Mr. Sardonell had not been operating his business any differently than in the past. (*Id.* at ¶ 12.) Plaintiffs state that Vince Blackmon, a building inspector and code compliance officer for Powder Springs, warned them in a phone call in October 1998 that there had been complaints about vans parked at their house. (Pls.' Stmt. of Mat. Facts [58] at ¶ 15.)

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[3] Citing the deposition of two neighbors, Murphy and Mary Sitherwood, plaintiffs claim that it is untrue that the City had received any complaints about activities at the 3891 house. (Pls.' Stmt. of Mat. Facts [58] at ¶ 13.) Sitherwood stated that she noticed several vans at the 3891 house, but stated that she never complained to the City. Murphy also stated that she made no complaints about the 3891 house. The fact that these two neighbors did not complain, though, does not establish that there were no complaints.

On January 25, 1999, Blackmon sent Mr. Sardonell a letter advising him that there had been "continuous complaints to the City concerning business vehicles parked on [the Sardonell's] premises; also, numerous deliveries." (Defs.' Stmt. of mat. Facts [50] at ¶ 16; Pls.' Stmt. of Mat. Facts [58] at ¶ 15.) Blackmon's letter explained that the Sardonells were in violation of their Customary Home Occupation License due to the number of business vehicles parked at the house and the fact that they received deliveries there. (Pls.' Stmt. of Mat. Facts [58] at ¶ 15.) The Sardonells were advised that they either needed to "remove all exterior evidence of a home business" or apply for a land use permit. (*Id.*) They were given until January 28, 1999 to comply with the letter. (*Id.*)

The Sardonells decided to appear before the City Council to request a land use permit. (*Id.* at ¶ 16.) Prior to the City Council meeting, however, plaintiffs had to attend the council workshop/agenda meeting and a zoning and planning meeting. (*Id.*) Plaintiffs claim that at the zoning and planning meeting, Mayor Sailors made the statement that Mrs. Sardonell's plans to rent her house through Section 8 sounded like a threat to him. (*Id.* at ¶ 17.)[4] The zoning and planning committee voted to let the matter go before the entire City Council. (*Id.*)

The Sardonells appeared at the March 1, 1999, Powder Springs City Council meeting to request a land use permit. (Defs.' Stmt. of Mat. Facts [50] at ¶ 17; Pls.' Stmt. of Mat. Facts [58] at ¶¶ 16, 17.) At the meeting, the

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[4] It is unclear to the Court whether or not the Sardonells utilized the Section 8 program.

Sardonells informed the city council members that they had located commercial property at 4018 Finley Road, Suite B, Powder Springs, Georgia, and were planning on moving their business there as of April 1. (*Id.* at ¶ 18; *Id.* at ¶ 20.)

The discussion centered around whether the Sardonells needed to obtain a land use permit for the thirty or so days that they would continue to operate their business from 3891 Blythewood Circle until they moved to Finley Road. the Sardonells stated that they would be able to comply with all aspects of their Customary Home Occupation License during the thirty days, except for the restriction on having more than one business vehicle on the premises. After a prolonged discussion, the City Council concluded that the most appropriate action was to continue consideration of the Sardonells' land use permit application until the next City Council meeting early in April, at which time the issue would hopefully be mooted if the Sardonells were able to move their business to Finley Road as planned. (Defs.' Stmt. of Mat. Facts [50] at ¶ 23.) The stated purpose of this vote was "to allow the Sardonells to continue to have two vans on their property until the first meeting in April." (*Id.*)

The Sardonells also raised the issue of how to handle their business license when they relocated. (*Id.* at ¶ 19.) They were told that they did not have to apply for a new license, that they could simply file a change of address. (*Id.* at ¶ 20.) Defendants claim that neither of the Sardonells disputed that they were in violation of their Customary Home Occupation License or that the complaints filed against them had anything to do with the tenants at the 3890 house. (*Id.* at ¶ 21.) Plaintiffs, however, state that

they asserted at this meeting that they were not in violation of the City's Home Occupation Ordinance and claim that there were neighbors at the meeting who supported their ability to continue operating their business without interference.

The Sardonells appeared at the next City Council meeting, conducted April 5, 1999. (Defs.' Stmt. of Mat. Facts [50] at ¶ 24; Pls.' Stmt. of Mat. Facts [58] at ¶ 22.) Mrs. Sardonell stated that she had decided that even though they had relocated their business to Finley Road, she wanted to pursue the land use permit for the 3891 house because she wanted to be able to park her vans there if she needed to. (*Id.* at ¶ 25; *Id.* at ¶ 22.)[5] Mayor Sailors asked Mrs. Sardonell is [sic] she had transferred the business license to the Finley Road location, to which she responded affirmatively. (Defs.' Stmt. of Mat. Facts [50] at ¶ 24.) The City Attorney, Ms. Bandy, instructed Mrs. Sardonell that as long as they did not have a business license for and were not conducting a business from the 3891 house, there were no zoning restrictions that would prohibit the Sardonells from parking their vehicles at their home. (*Id.* at ¶ 26.) Bandy mentioned to Mrs. Sardonell that there may be "certain regulations about parking on the street and that kind of thing," but that the City Council did not handle issues relating to residences that had nothing to do with business licenses. Although Mrs. Sardonell wanted assurance that she was free to park her vans at her home, Bandy made it clear to her that he was not in a position to tell her whether she could

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[5] Plaintiffs claim that they had moved the business on or before April 1, 1999. (Pls.' Stmt. of Mat. Facts [58] at ¶ 28.)

possibly be in violation of some other city ordinance. (*Id.* at ¶ 27.) The City Council and Mayor then voted affirmatively to grant Mrs. Sardonell's withdrawal of her land permit use application. (*Id.* at ¶ 28.) Plaintiffs made no allegations at this meeting that they had been wrongly targeted by the city. (*Id.* at ¶ 29.)

By this time, Mr. Sardonell had filled out the paperwork to transfer the business license to the new location. (*Id.* at ¶ 30.)[6] Plaintiffs claim that no business operations involving the heating and air company took place at the 3891 house after April 1, 1999. (Pls.' Stmt. of Mat. Facts [58] at ¶ 24.) Defendants, however, state that after numerous complaints of business activities at the 3891 house, City Manager Wayne Wright asked the chief of police to issue a citation. (Defs.' Stmt. of Mat. Facts [50] at ¶ 31.) Wright states that his request was in the normal course of business and was not the first time he had made such a request. (*Id.*)

On April 19, 1999, Mrs. Sardonell was issued a citation for violating a city zoning ordinance prohibiting individuals from operating a business without a license.

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[6] Plaintiffs allege that the business license was never transferred because the city imposed "roadblocks" to its transfer. (Pls.' Stmt. of Mat. Facts [58] at ¶ 29.) Mr. Sardonell claims that he was not allowed to pay the transfer fee and that the landlord was told, for the first time in the fourteen years he had been renting the building, that he had to obtain an inspection by the fire department and an occupational permit before the Sardonells could operate their business. (*Id.* at ¶ 30.) Mr. Sardonell claims he never received a new or amended license, and in May 1999, moved his business outside the City of Powder Springs. (*Id.* at ¶ 32.)

(Defs.' Stmt. of Mat Facts [50] at ¶ 33; Pls.' Stmt. of Mat. Facts [58] at ¶ 24.)[7] Plaintiffs claim that at the time Mrs.

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[7] Neither parties' statement of the facts contains a recitation of what happened with the citation. Defendants' original statement of material facts did give this background, and it is discussed below simply to provide a timeline of events:

A hearing was held before Judge Steve Yaklin on June 23, 1999. (Defs.' Stmt. of Mat. Facts [17] at ¶¶ 14-15; *Id.* at Exh. H.) The city's position at the hearing was that the Sardonells had transferred their business license as of April 1, but continued to conduct business from the 3890 house subsequent to that date. (*Id.* at Ex. H. at 2.) The City stated that its officials had observed vans picking up equipment from the home after April 1. (*Id.* at Ex. H. at 3.) After observing the vans for several weeks, the City concluded that the Sardonells had continued to operate their business from this location, which was no longer licensed.

Mrs. Sardonell's argument at the hearing appears to be that, although she had asked to transfer the business license to the Finley Road address, she was never informed that the transfer was complete, and therefore, at the time she was issued the citation, she had a valid business license for the 3890 house. (*Id.* at Ex. H. at 8.) Accordingly, Mrs. Sardonell contended that she was not guilty of operating a business without a license. She also stated that, if the City felt that she had violated zoning laws by having the vans make pick-ups from the 3890 house, she should have been cited for violating the appropriate zoning laws, not operating without a business license. (*Id.* at Ex. H. at 8-9.) Mrs. Sardonell made no mention of any discriminatory animus by the defendants towards her or her husband.

After hearing the arguments of the parties and the testimony of witnesses who observed the vans at the Blythewood property, Judge Yaklin stated that although he acknowledged Mrs. ardonell's technical defense that the transfer of the license may not have been finalized at the time of the citation, he was going to find that at the time the citation was issued, Mrs. Sardonell was no longer licensed to conduct business at the Blythewood Circle house. (*Id.* at Ex. H. at 11.)

Sardonell received the citation, Mr. Sardonell owned two business vans and, at most times, only one of these vans was parked at their home. (Pls.' Stmt. of Mat. Facts [58] at ¶ 26.) Plaintiffs then filed suit on July 27, 1999. (compl. [1].) As noted below, the criminal charge against Mrs. Sardonell was later dismissed.

Plaintiffs' complaint alleges that defendants' actions violated the Fair Housing Act, as well as 42 U.S.C. §§ 1981, 1982, 1983, and 1985. On January 12, 2000, defendants filed a motion for abstention on the grounds that there was an ongoing state proceeding concerning this case. (Mot. for Abstention [10].) Although discovery had not yet closed, defendants filed a motion for summary judgment on January 31, 2000. (First Mot. for Summ. J. [17].) On March 3, 2000, the Court issued an Order denying without prejudice defendants' motion for summary judgment and suspending discovery. (Order [31].) The Court later granted defendants' motion for abstention, and the case was stayed for a period of time. (Order [35].) Upon motion by plaintiffs to reopen the case because an entry of nolle prosequi had been entered as to the

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Because the violation carried with it up to a twelve month jail sentence, Mrs. Sardonell then requested that the matter be transferred to State Court for trial. (*Id.* at Ex. H. at 12.) At the conclusion of the June 23 hearing, Judge Yaklin signed an order binding the case over to State Court. As of the time Plaintiff filed her complaint in this Court on July 23, 1999, the State Court had not yet scheduled a trial or taken any further action regarding the citation.

underlying state claim, the Court reopened these proceedings. (Order [41].)[8]

Plaintiffs thereafter filed a motion to file a second amended complaint. (Mot. for Leave to File Pls.' Second Amendment to Compl. [48].) Defendants have renewed their motion for summary judgment. (Mot. for Summ. J. [50].) The Court addresses these and several other miscellaneous motions in this Order.

DISCUSSION

I. Motion for Summary Judgment

A. Summary Judgment Standard

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). A fact's materiality is determined by the controlling substantive law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). An issue is genuine when the evidence is such that a reasonable jury could return a verdict for the nonmovant. *Id.* at 249-50.

Summary judgment is not properly viewed as a device that the trial court may, in its discretion, implement in lieu of a trial on the merits. Instead, Rule 56 of the Federal rules of Civil Procedure mandates the entry of summary judgment against a party who fails to make a

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[8] Curiously, plaintiffs appealed the grant of their own motion to reopen. (Notice of Appeal [44].)

showing sufficient to establish the existence of every element essential to that party's case on which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In such a situation, there can be no genuine issue as to any material fact, as a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial. *Id.* at 322-323 (quoting FED. R. CIV. P. 56(c)).

The movant bears the initial responsibility of asserting the basis for his motion. *Id.* at 323. However, the movant is not required to negate his opponent's claim. The movant may discharge his burden by merely " 'showing' – that is, pointing out to the district court – that there is an absence of evidence to support the non-moving party's case." *Id.* at 325. After the movant has carried his burden, the non-moving party is then required to "go beyond the pleading" and present competent evidence designating "specific facts showing that there is a genuine issue for trial." *Id.* at 324. While the court is to view all evidence and factual inferences in a light most favorable to the non-moving party, *Samples v. City of Atlanta*, 846 F.2d 1328, 1330 (11th Cir. 1988), "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson*, 477 U.S. at 247-48 (1986).

B. Plaintiffs' Claims

1. Fair Housing Act

Before addressing the merits of plaintiffs' Fair Housing Act claim, the Court pauses to state that it is difficult to even discern legal underpinnings of this claim. In their complaint, plaintiffs state, "The conduct of the Defendants constitute a violation for the 42 U.S.C. § 3604 in that defendants acted in concert and under color of state law to conspire to deny plaintiffs the right to rent their residence to individuals without regard to race. (Compl. [1] at ¶ 21.) That is the full extent that the Fair Housing Act is discussed in the complaint. In their motion for summary judgment, defendants argue that plaintiffs have failed to state a cognizable claim under the Fair Housing Act. (Br. in Supp. of Mot. for Summ. J. [50] at 10-38.) The Court must agree.

Plaintiffs contend that they have stated a claim under 42 U.S.C. § 3604. In its entirety, § 3064 reads:

> As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful –
>
> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin.
>
> (b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of

race, color, religion, sex, familial status, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, handicap, familial status, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, handicap, familial status, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, handicap, familial status, or national origin.

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of –

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental

of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of –

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

(3) For purposes of this subsection, discrimination includes –

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the case of a rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted.

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling; or (C) in connection with the design and construction of covered multifamily dwellings for first occupancy after the date that is 30 months after September 13, 1988, a failure to design and construct those dwellings in such a manner that –

(i) the public use and common use portions of such dwellings are readily accessible to and usable by handicapped persons;

(ii) all the doors designed to allow passage into and within all premises within such dwellings are sufficiently wide to allow passage by handicapped persons in wheelchairs; and

(iii) all premises within such dwellings contain the following features of adaptive design:

(I) an accessible route into and through the dwelling;

(II) light switches, electrical outlets, thermostats, and other environmental controls in accessible locations;

(III) reinforcements in bathroom walls to allow later installation of grab bars; and

(IV) usable kitchens and bathrooms such that an individual in a wheelchair can maneuver about the space.

(4) Compliance with the appropriate requirements of the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people (commonly cited as "ANSI A117.1") suffices to satisfy the requirements of paragraph (3)(C)(iii).

(5)(A) If a State or unit of general local government has incorporated into its laws the requirements set forth in paragraph (3)(C), compliance with such laws shall be deemed to satisfy the requirements of that paragraph.

(B) A State or unit of general local government may review and approve newly constructed covered multifamily dwellings for the purpose

of making determinations as to whether the design and construction requirements of paragraph (3)(C) are met.

(C) The Secretary shall encourage, but may not require, States and units of local government to include in their existing procedures for the review and approval of newly constructed covered multifamily dwellings, determinations as to whether the design and construction of such dwellings are consistent with paragraph (3)(C), and shall provide technical assistance to States and units of local government and other persons to implement the requirements of paragraph (3)(C).

(D) Nothing in this subchapter shall be construed to require the Secretary to review or approve the plans, designs or construction of all covered multifamily dwellings, to determine whether the design and construction of such dwellings are consistent with the requirements of paragraph 3(C).

(6)(A) Nothing in paragraph (5) shall be construed to affect the authority and responsibility of the Secretary or a State or local public agency certified pursuant to section 3610(f)(3) of this title to receive and process complaints or otherwise engage in enforcement activities under this subchapter.

(B) Determinations by a State or a unit of general local government under paragraphs (5)(A) and (B) shall not be conclusive in enforcement proceedings under this subchapter.

(7) As used in this subsection, the term "covered multifamily dwellings" means –

> (A) buildings consisting of 4 or more units if such buildings have one or more elevators; and
>
> (B) ground floor units in other buildings consisting of 4 or more units.
>
> (8) Nothing in this subchapter shall be construed to invalidate or limit any law of a State or political subdivision of a State, or other jurisdiction in which this subchapter shall be effective, that requires dwellings to be designed and constructed in a manner that affords handicapped persons greater access than is required by this subchapter.
>
> (9) Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others.

42 U.S.C. § 3604.

Defendants contend that plaintiffs have failed to state a claim that any of the defendants, in either their official or individual capacities, discriminated against plaintiffs in violation of the FHA by intentionally discriminating, taking actions that create a disparate impact, or failing to make appropriate accommodations. Indeed, plaintiffs fail to allege any impact on the rental of their home to the African-American family, and it would seem that plaintiffs lack any standing to bring a FHA claim.[9] In response,

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[9] Defendants also point out that the FHA exempts "any single-family house sold or rented by an owner provided that such individual owner does not own more than three such single-family houses at one time." 42 U.S.C. § 3603(b)(1).

plaintiffs state that their claims "are based upon the Defendants' violation of 42 U.S.C. § 3604 sections (2), (3), and (5)." (Pls.' Mem. and Opp'n to Defs.' Mot. for Summ. J. [58] at 17.) In support of her argument that these subsections provide plaintiffs relief, however, plaintiffs' counsel cites no cases in which § 3604(2), (3), or (5) are mentioned. (*See id.* at 18-19.) This is not surprising, as there are no subsections (2), (3), or (5) to § 3604.

The Court has conducted its own independent analysis, and simply cannot discern the basis of plaintiffs' claims. From the facts alleged by plaintiffs, it appears that what they are trying to claim is that defendants retaliated against them for renting to non-whites. Plaintiffs, however, have failed to provide one cite to a case in which this sort of claim was cognizable under the FHA. Plaintiffs are not acting *pro se.* In fact, they have had two different firms work on this case. As such, the Court would think that if counsel were so convinced that such a case existed, able counsel would have been able to identify such a case, or at least cite to analogous cases. Instead of citing any case law, however, plaintiffs simply repeat the facts of the case again. Without any direction from plaintiffs as to the legal underpinnings of their FHA claim, the Court has no option but to **GRANT** defendants' motion for summary judgment on this count.

2. Section 1983

Plaintiffs' second claim is that "[t]he conduct of the defendants [is] actionable under 42 U.S.C. § 1983 as a violation of the plaintiffs' right to equal protection under the laws and substantive due process, as well as their

right not to be deprived of property rights without procedural due process." (Compl. [1] at ¶ 23.) Section 1983 provides a federal remedy for the deprivation of rights, privileges, or immunities protected by the Constitution or the laws of the United States.[10] *See Patsy v. Board of Regents*, 457 U.S. 496, 502-08 (1982); *Mitchum v. Foster*, 407 U.S. 225, 238-42 (1972); *McNeese v. Board of Educ.*, 373 U.S. 668, 671-72 (1963). In order to establish a claim under § 1983, plaintiffs must show a violation of a right secured by the Constitution of the United States, and also that the deprivation of that right was committed by a person acting under color of state law. *Cummings v. DeKalb County*, 24 F.3d 1349 (11th Cir. 1994); *see also Graham v. Connor*, 490 U.S. 386, 393-94 (1989) ("§ 1983 'is not itself a source of substantive rights,' but merely provides 'a

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[10] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any Sate or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in the action at law, suit in equity, or other proper proceedings for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, an Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

method for vindicating federal rights elsewhere conferred' ") (quoting *Baker v. McCollan,* 443 U.S. 137, 144 n.3 (1979)).

In their complaint, plaintiffs claim that defendants' behavior violated their rights to equal protection under the law, substantive due process, and the right not to be deprived of property rights without procedural due process. (Compl. [1] at ¶ 23.) Plaintiffs' brief in response to defendants' motion for summary judgment provides no further elucidation as to the legal underpinnings of this claim. The Court nonetheless reviews the elements of each constitutional claim to illustrate why plaintiffs' claim fails.

a) Equal Protection

"Equal protection claims can be divided into three broad categories. The first and most common type is that a statute discriminates on its face." *E&T Realty v. Strickland,* 830 F.2d 1107, 1112 n.5 (11th Cir. 1987) (citations omitted). Plaintiffs do not assert that such a statute is at issue in this case. "The second type of equal protection claim is that neutral application of a facially neutral statute has a disparate impact." *Id.* Plaintiff's complaint does not appear to assert a disparate impact claim.

"The third type of claim is that defendants are unequally administering a facially neutral statute." *Id.* While a liberal reading of plaintiffs' pleading may indicate that this is the type of claim that they are attempting to bring, they have failed to assert the required elements of this claim. "In order to prevail on an equal protection

claim based on the application of a facially neutral statute, it must be established that: (1) the plaintiff was treated differently than similarly situated persons; and (2) the defendant unequally applied the facially neutral statute for the purpose of discriminating against the plaintiff." *Strickland v. Alderman,* 74 F.3d 260, 264 (11th Cir. 1996) (citing *E&T Realty,* 830 F.2d at 1109-10). Regarding the second prong, an "unequal application" claim requires "an element of intentional or purposeful discrimination." *Snowden v. Hughes,* 321 U.S. 1, 8 (1944).

The Court assumes that plaintiffs' equal protection claim is that defendants selectively enforced the city's Home Occupation Business License requirement, refused to transfer their business license, and refused to grant plaintiffs a land use permit, and cited Mrs. Sardonell for operating a business without a license for the discriminatory reason that plaintiffs had rented their other house to an African-American family. In order to state a claim for selective enforcement, however, plaintiffs must show that there were other similarly situated individuals who were treated differently. In their brief in opposition to defendants' motion for summary judgment, plaintiffs state "the affidavits of John Long and Gordon and Sheila Powell all set forth their observation that there are numerous violations of the City's municipal ordinances and in and around the neighborhood that the plaintiffs live in." (Pls.' Mem. and Opp'n to Defs.' Mot. for Summ. J. [58] at 30.) Upon reviewing those affidavits, however, the Court saw no mention of instances of the City failing to enforce City ordinances. (Affs. [56].) Having provided the Court with no comparators at all, similarly situated or not, plaintiffs' equal protection claim fails as a matter of law.

b) Procedural and Substantive Due Process

The Court is unsure of the basis of plaintiffs' substantive due process claim. Plaintiffs cite one case is [sic] support of their claim, *Hibben v. Smith,* 191 U.S. 310 (1903). *Hibben* involved a challenge to the method in which real property was assessed. The Court can find no correlation between *Hibben* and the present case that would serve to elucidate plaintiffs' due process claims. In their complaint, plaintiffs also allege that defendants have violated their "right not to be deprived of property without due process of law." (Compl. [1] at ¶ 23.) As with the previous two claims, plaintiffs fail to flesh out the basis for their procedural due process claim. It is insufficient for a plaintiff to merely allege a claim and in support recite the facts without providing any legal analysis. While a plaintiff need only provide a defendant notice of his claims in the complaint, at the summary judgment stage, the nonmovant certainly should be prepared to argue his claim. This necessarily involves citing legal authority or, if none exists, explaining to the court why it should forge new ground in the law. Here, plaintiffs have done neither. The Court will not act as legal advocate for one party, doing its legal research and creating its arguments, as it would be unfair to the other side to do so. In the present case, the Court is surprised defendants were even able to respond to plaintiffs' claims, as vague as plaintiffs were in making them.[11]

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[11] Although the Court is uncertain of the exact nature of plaintiffs' claims, it would appear that both their substantive and procedural due process claims are foreclosed under *Rymer v. Douglas County,* 764 F.2d 796 (11th Cir. 1985). In *Rymer,* the

Plaintiff has failed to establish a prima facie case of § 1983 discrimination. As stated above, a § 1983 claim

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plaintiffs sued the county after the county issued a building permit for a lot that turned out to be unsuitable for residential use because a high water table precluded the use of a septic system. As to the substantive due process claim, the court stated:

> The current test in this circuit as to whether there has been a violation of substantive due process in the context of § 1983 is twofold. First it must be determined whether there has been a deprivation of a federal constitutionally protected interest, and secondly, whether the deprivation, if any, is the result of an abuse of governmental power sufficient to raise an ordinary tort to the stature of a constitutional violation.

Id. at 801. In the present case, plaintiffs have failed to allege a deprivation of a constitutionally protected interest. If plaintiffs base this claim on the failure of Powder Springs to grant them a land use permit, the claim clearly fails. *See DeKalb Stone, Inc. v. County of DeKalb, Georgia*, 106 F.3d 956, 959 (11th Cir. 1997) ("It is well established that land use rights, as property rights generally, are state-created rights [rather than constitutional].").

As to procedural due process, the *Rymer* court stated as follows:

> Under *Hudson*, a plaintiff cannot bring a property claim against a governmental body if the governmental body being sued provides a meaningful post-deprivation remedy. 104 S. Ct. at 3203. The Court determined that a constitutional tort did not exist unless the state refused to provide a meaningful post-deprivation remedy. It is our determination that the law of Georgia provides an adequate means to address the claims alleged by appellants in this case. A county and its officials can be sued under Georgia law for the type of injury alleged by the appellants.

Id. at 803.

requires a showing of two elements: "(1) the act or omission deprived plaintiff of a right, privilege or immunity secured by the Constitution or laws of the United States, and (2) that the act or omission was done by a person acting under color of law." *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327, 330 (1986). Plaintiff has failed to assert that he was denied a federal right, privilege, or immunity.[12] Accordingly, the Court **GRANTS** defendants' motion for summary judgment as to plaintiff's § 1983 claim.[13]

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[12] A violation of §§ 1981, 1982, and 1985 could also give rise to a § 1983 claim, but as discussed in greater detail below, plaintiffs have failed to make a prima facie case under any of these statutes either.

[13] In addition to this fatal flaw, defendants also argue that defendants Noriega and Sailors were entitled to legislative immunity because they were acting in their official capacities ruling on zoning and land use issues. *See Baytree of Inverray Realty Partners v. City of Lauderhill*, 873 F.2d 1407, 1409 (11th Cir. 1989) (holding absolute legislative immunity available for defendants regarding failure to grant an application to amend a city zoning ordinance). Further, defendants allege that all individual defendants are entitled to qualified immunity because plaintiffs have failed to establish that they acted in violation of clearly established law. Lastly, defendants contend that the City of Powder Springs and the defendants in the official capacities are immune from suit because plaintiffs failed to establish liability under *Monnell v. Department of Soc. Servs.*, 436 U.S. 658, 690 (1978). Having found that plaintiffs failed to establish that they were denied a federal right, the Court need not reach any of these issues. It notes, however, that all of these defenses appear to be sound.

3. Section 1981

Plaintiffs' third claim is that defendants violated 42 U.S.C. § 1981. Section 1981 prohibits racial discrimination in the making and enforcing of contracts. The statute reads:

> All persons within the jurisdiction of the United States shall have the same rights in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens.

42 U.S.C. § 1981.

To establish a prima facie case of discrimination under § 1981, a plaintiff must prove purposeful discrimination. *Patterson v. McLean Credit Union*, 491 U.S. 164, 175 (1989). The elements of a section 1981 claim are: "(1) That plaintiff is a member of a racial minority; (2) An intent to discriminate on the basis of race by the defendant; and (3) That the discrimination concerned . . . the right to 'make and enforce contracts.' " *Baker v. McDonald's Corp.*, 686 F. Supp. 1474, 1481 (S.D. Fla. 1987), *aff'd by* 865 F.2d 1272. Although the language of § 1981 speaks of racial minorities, it is applicable to racial discrimination against white persons as well. *See McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 287 (1976).[14] Plaintiffs, however, do not appear to be alleging that they were discriminated against because they were white, but rather, because they entered into a contract with a black person. Plaintiffs

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[14] The Court's understanding of the facts is that while Mrs. Sardonell's tenants are black, plaintiffs are both white.

have not cited any case law allowing this sort of "association" claim under § 1981. Furthermore, while there are circumstances where a plaintiff may have standing to assert a claim on behalf of a third party, plaintiffs have not alleged that this is what they are doing, nor do the facts indicate that third-party standing would be appropriate in this case.

More importantly perhaps, plaintiffs have not asserted that defendants interfered with their ability to "make and enforce contracts." None of the defendants' actions related to the agreement between Mrs. Sardonell and the tenants, and there is no indication that the rental agreement was impacted in any way by defendants' alleged actions. Accordingly, defendants' motion for summary judgment is **GRANTED** as to plaintiffs' § 1981 claim.

4. Section 1982

Plaintiffs' fourth claim alleges a violation of 42 U.S.C. § 1982. Section 1982 provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and covey [sic] real and personal property." Again, as with the claims discussed above, plaintiffs have failed to describe the legal underpinnings of their claim, and plaintiffs' situation would not appear to fit within the scope of a § 1982 claim. In a typical § 1982 claim, a plaintiff must show:

> (1) that he is a member of a racial minority; (2) that he applied for and was qualified to rent or purchase certain property or housing; (3) that he

> was rejected; and (4) that the housing or rental opportunity remained available thereafter.

Bell v. Mike Ford Realty Co., 857 F. Supp. 1550 (S.D. Ala. 1994). Plaintiffs' claim simply does not fit this framework, and plaintiffs have provided the Court with no further explanation of why they feel they have a cognizable § 1982 claim. Accordingly, plaintiffs' § 1982 claim fails as a matter of law.

5. Section 1985

Plaintiffs' last claim is that defendants entered into a conspiracy to deprive plaintiff of equal protection of the laws in violation of 42 U.S.C. § 1985. Although plaintiffs do not specify, the Court assumes that they are bringing their claim under § 1985(3), which provides in part:

> If two or more persons . . . conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may

> have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U,.S.C. § 1985(3).

This section was intended to encompass only those conspiracies motivated by animus against the kind of classes Congress was trying to protect. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971); *Kimble v. D.J. McDuffy, Inc.*, 648 F.2d 340, 347 (5th Cir.), *cert. denied*, 454 U.S. 1110 (1981). The central concern of the enactors of 42 U.S.C. § 1985 was "combating the violent and other efforts of the Klan and its allies to resist and to frustrate the intended effects of the Thirteenth, Fourteenth and Fifteenth Amendments." *United Bhd. of Carpenters & Joiners, Local 610 v. Scott*, 463 U.S. 825, 837 (1983). Before a defendant can be held liable under this section, a plaintiff must be a victim of a class-based discrimination. *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979). A plaintiff in an action under this section must demonstrate he is a member of some class discriminated against, otherwise, his claim must fail. *Hutchens v. Beckham*, 521 F. Supp. 426, 429 (S.D. Ga. 1981).

In addition, in order to recover under § 1985(3), plaintiffs must allege and prove the following elements:

> (1) a conspiracy;
>
> (2) for the purpose of depriving, directly or indirectly, any person or class of persons of the equal protection of the laws or of equal privileges and immunities under the laws;
>
> (3) an overt act in furtherance of the object of the conspiracy; and

> (4) that the plaintiff (a) was injured in his person or property, or (b) was deprived of having and exercising any right or privilege of a United States citizen.

Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986), *abrogated on other grounds by Nolin v. Isbell*, 207 F.3d 1253 (11th Cir. 2000). "the language of Section 1985 which requires an intent to deprive one of equal protection or equal privileges and immunities means that there must be some racial or otherwise class-based invidiously discriminatory animus behind the conspirators' action." *Id.* at 1007-08. Additionally, merely conclusory, vague and general allegations of conspiracy are not sufficient. *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984). "[C]ourts insist that plaintiffs state with specificity the facts supporting an allegation of conspiracy in order to control frivolous conspiracy suits under §§ 1983." *Schlosser v. Coleman*, 818 F. Supp. 1534, 1537 (M.D. Fla. 1993) (citing *Slotnick v. Staviskey*, 560 F.2d 31 (1st Cir. 1977)).

As with their other claims, plaintiffs have done nothing more than repeat the facts with no explanation of their legal significance. Plaintiffs have not alleged that they were a member of a class discriminated against and have not alleged a conspiracy with specificity. Accordingly, plaintiffs' § 1985 claim fails as well.

II. Plaintiffs' Motion for Leave to File a Second Amended Complaint

On December 12, 2000, plaintiffs filed a motion to amend their complaint in order to add two new defendants, Betty Jo Murphy and Catherine Rapener, and to

add several new factual allegations as well as a state law claim. (Mot. for Leave to File Pls.' Second Am. to Compl. [48].) Defendants have opposed the motion to amend on the grounds that (1) at the time plaintiffs filed their motion to amend, the case has been ongoing for fifteen months; (2) discovery had closed; (3) plaintiffs have had full knowledge since their depositions were taken in March 2000 of whatever role Murphy and Rapener played; (4) plaintiffs have supplied no reason for the delay in adding these parties and claims; (5) no new facts have been developed since discovery; and (6) plaintiffs have failed to properly present a request to add new parties. (*Id.*) Although plaintiffs filed a reply to defendants' response, they failed to address any of these concerns, and instead simply argued that courts usually liberally allow amendment and that they would be unable to bring claims against the new defendants if the Court did not grant their motion. (Pls.' Reply to Defs.' Opp'n to Pls' Mot. for Leave to File Second Am. Compl. [57].)

At this stage in the litigation, Rule 15(a) of the Federal Rules of Civil Procedure allows a party to amend its pleading "only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). "Courts have interpreted [amendment] provisions liberally, in line with the Federal Rules' overall goal of resolving disputes, insofar as possible, on the merits and in a single judicial proceeding." *Spartan Grain & Mill Co. v. Ayers*, 517 F.2d

214, 220 (5th Cir. 1975).[15] In explaining the amendment standard, the Eleventh Circuit has observed that "unless a substantial reason exists to deny leave to amend, the discretion of the district court is not broad enough to permit denial." *Shipner v. Eastern Air Lines, Inc.*, 868 F.2d 401, 407 (11th Cir. 1989). In determining whether a substantial reason exists to deny leave to amend, the district court should consider the following factors: (1) undue delay, bad faith, or dilatory motive on the part of the movant, (2) repeated failure to cure deficiencies by amendments previously allowed, (3) undue prejudice to the opposing party by virtue of the allowance of the amendment, and (4) futility of amendment. *Foman v. Davis*, 371 U.S. 178, 182 (1962).

The Court denies plaintiff's motion to amend on the basis of plaintiffs' undue delay. Plaintiffs have offered no explanation why they did not bring these claims at the time they filed their original complaint or at least soon after taking the depositions in March 2000. Instead, plaintiffs have delayed until after the discovery period has run in the case before attempting to add the claims. Permitting this amendment could trigger another discovery period and would subject defendants to further expense as a result of plaintiffs' dilatory actions.

In addition, defendants are correct that in order to add new defendants, Rule 20 is what controls rather than

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[15] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit Court of Appeals handed down prior to the close of business on September 30, 1981.

Rule 15. Rule 20 of the Federal Rules of Civil Procedure provides that all persons may be joined in one action as defendants if plaintiff asserts against them any right to relief arising out of the same transaction or occurrence and if questions of law and fact common to all defendants will arise in the action. Fed. R. Civ. P. 20. Even if the Court were to construe plaintiffs' motion as one to add new parties under Rule 20, the motion fails for the same reason as their motion to add new allegations and add the state claim. Plaintiffs did not seek to add defendants Murphy and Rapener until after the discovery period had expired, and the Court concludes that they unduly delayed in seeking to add these defendants. Accordingly, the Court **DENIES** plaintiffs' motion to join Murphy and Rapener as party defendants.

III. Plaintiffs' Motion to Strike

Plaintiffs have brought a motion to strike portions of defendants' brief in support of their motion for summary judgment. (Mot. to Strike Portions of the Defs.' Br. in Supp. of Mot. for Summ. J. [60].) In their motion to strike, plaintiffs argue (1) that the Court should not consider an attachment to the affidavit of Catherine Rapener which purports to be a business license, but which has obviously been altered; (2) that the Court should not consider the transcripts of the City Council meetings because they are hearsay and not reliable; and (3) that several cases cited by defendants were not in proper citation form and therefore should not be considered. The Court did not rely on the Rapener affidavit or the transcripts in granting defendants' motion for summary judgment. Accordingly, there is no need to reach the issue of whether they

should be stricken. As to defendants' citations, the Court was able to find the cases cited without much difficulty. The fact that defendants' counsel may not have cited the cases in perfect "Bluebook" form is not a legitimate reason to strike the cites from defendants' argument. Accordingly, plaintiffs' motion to strike is DENIED.

CONCLUSION

For the foregoing reasons, the Court finds that plaintiffs' Motion for Leave to File a Second Amendment to Complaint [48] is **DENIED**, defendants' Motion for Summary Judgment [50] is **GRANTED**, plaintiffs' Motion to Strike Portions of Defendants' Brief [60] is **DENIED**, plaintiffs' Motion for Hearing on Defendants' Motion for Summary Judgment [61] is **DENIED**, plaintiffs' Motion for Leave of Court to File Excess Page Limitation [65] is **GRANTED**, and plaintiffs' Motion to Continue Consideration of Defendants' Motion for Summary Judgment [66] is **DENIED AS MOOT.**

SO ORDERED, this 19 day of April, 2001.

/s/ Julie E. Carnes
JULIE E. CARNES
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-12824-EE

EVA CHARLENE SARDONELL,
DOUGLAS SARDONELL,

Plaintiffs-Appellants,

versus

GARY NORIEGA, individually and as Council Member, City of Powder Springs,
WAYNE WRIGHT, individually and as City Manager, City of Powder Springs,
RICHARD SAILORS, individually and as Mayor, City of Powder Springs,
VINCE BLACKMON, individually and as Code Compliance Officer,
CITY OF POWDER SPRINGS,

On Appeal from the United States District Court for the Northern District of Georgia

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(Filed Feb. 19, 2002)

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ___ F.2d ___).

Before: CARNES, HULL and GODBOLD, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35,

Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ [Illegible]
UNITED STATES CIRCUIT JUDGE